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Nos. 27 and 28

In the Supreme Court of the United States

OCTOBER TERM, 1950

STANDARD OIL COMPANY OF NEW JERSEY, PETITIONER

v.

UNITED STATES OF AMERICA, AS OWNER OF THE UNITED STATES SHIP YMS-12

STANDARD OIL COMPANY OF NEW JERSEY, AS OWNER OF THE STEAM TANKER JOHN WORTHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 78-95) is reported at 81 F. Supp. 183. The opinion of the United States Court of Appeals for the Second Circuit (R. 102-114) is reported at 178 F. 2d 488.

JURISDICTION

The judgment of the Court of Appeals was entered on December 15, 1949 (R. 114). The petition for a writ of certiorari was filed on March 10, 1950, and was granted on June 5, 1950 (R. 116). The jurisdiction of this court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a collision between a merchant ship and a warship, caused by the negligent navigation of both vessels, is converted from a marine risk to a war risk, for insurance purposes, simply by virtue of the fact that one of the vessels was a naval mine sweeper engaged in its work.

2. If the answer to the first question is in the affirmative, then the collision is a risk assumed by a war risk insurer and the war risk insurer is admittedly liable for any physical damage suffered by the merchant vessel in the collision. A second question is presented, however, whether the war risk insurer is also liable for the liability-over of the merchant ship to the warship for any physical damage suffered by the latter in the collision.

CONTRACT PROVISIONS INVOLVED

The war risk endorsement of the standard marine and war risk policy of War Shipping Administration provides in pertinent part (R. 83):

> It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause)

in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

The Free of Capture and Seizure Clause, delineating war risk insurance coverage, provides (R. 82):

> F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion, or insurrection, or civil strife arising therefrom.
>
> If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

Clause 20 of the time charter party entered into between petitioner and United States of America is set out in pertinent part in Appendix A, *infra*, pp. 50. The war risk binder of insurance issued by the United States to petitioner is set out in

pertinent part in Appendix B, *infra*, pp. 51-52. The collision clause of the standard marine and war risk policy of War Shipping Administration is set out in Appendix C, *infra*, pp. 52-53.

STATEMENT

These suits arose from a collision on December 16, 1942, between the United States Navy Ship *YMS-12* and the steam tanker *John Worthington*. The facts giving rise to the controversy are not in dispute, but are based on a stipulation of the parties (R. 68-70, 79).

The *YMS-12* was a mine sweeper of the United States Navy engaged in sweeping a buoyed channel in the approaches to New York harbor (R. 79). At the time of the collision the *YMS-12* was part of a mine sweeping formation of three ships proceeding seaward with mine sweeping gear streamed (R. 79). The *S.S. John Worthington*, owned by petitioner, was in ballast and outward bound in convoy (R. 79, 80). As it was at night, both ships were showing their proper running lights; in addition, the *YMS-12* was displaying three all-around green lights to indicate that it was a mine sweeping vessel towing mine sweeps (R. 79, 80). The weather was clear and the visibility good (R. 80).

The district court found (R. 80), pursuant to stipulation, that the collision "was contributed to both by fault in the navigation of *S.S. John Worthington* and fault in the navigation of the United States Ship *YMS-12*, consisting of failures on the

part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances." Only the mine sweeper sustained physical damage as a result of the collision (R. 80).

At the time of the collision the *John Worthington* was on a time charter to the United States (R. 80). Clause 20 of the charter party (*infra*, p. 50) provided that the United States was to furnish insurance on the *Worthington* "under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration," and petitioner was to assume or insure against all other risks. Petitioner chose to assume, rather than to insure, marine risks (R. 84). Pursuant to the provisions of the charter party, the United States issued a war risk binder of insurance to petitioner, which binder was in force at the time of the collision (R. 81). By the terms of the war risk binder (*infra*, pp. 51-52), the United States insured against "war risks only," and the binder and insurance were made subject "to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder * * *."

War risk coverage, then, was to be determined with reference to the standard marine and war risk policy of War Shipping Administration, referred to in the charter and in the binder. This

policy contained the following F. C. & S. Clause (*supra*, p. 3), excluding war risk insurance:

> F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *.
>
> If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war-risk endorsement remains in force.

The war risk endorsement of said policy (*supra*, pp. 2-3), stated:

> It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

Thus, the United States provided war risk insurance for the *John Worthington* by assuming those risks excluded from the usual marine hull form by the customary Free of Capture and Seizure (F. C. & S.) clause (R. 80-84).

The instant proceeding was instituted by a libel filed by the United States, as owner of the *YMS-12*, against the *John Worthington* to recover $150,000 on account of the damage sustained by the *YMS-12*

(R. 2-6). Petitioner's answer (R. 6-15) raised the defense, *inter alia*, that, should the *John Worthington* be found at fault, petitioner's liability was covered by the war risk insurance provided by the United States (R. 14). Petitioner also filed a cross libel (R. 19-26) against the United States as insurer for the recovery of any sum which it might be compelled to pay with respect to collision damages and for the costs and expense incurred in defending the collision suit (R. 25-26). The district court found that petitioner was liable to the United States for one half of the collision damages to the *YMS-12* since both vessels were at fault (R. 86). It held, however, that the collision was "a consequence of the warlike operation of *YMS-12*" (R. 87), and that the war risk insurance issued by the United States covered petitioner's collision liability to the United States as owner of the *YMS-12*, as well as any physical damage which might have been (but was not) suffered by the *Worthington* (R. 90-94). Further, the district court held the United States bound to indemnify petitioner, under the war risk insurance, for the cost of defending the collision suit (R. 95). Judgment was entered accordingly (R. 95-96).

On appeal, the district court judgment was reversed (R. 114-115). The court below found that the effective cause of the accident was not the warlike operation of the *YMS-12* but the negligence in navigation on the part of both vessels, that any

loss which might have resulted to the owners of the *Worthington* was due to a normal marine risk, that the war risk insurance was not applicable, and, therefore, that the United States was not liable as insurer (R. 112-113). Thus, the United States as owner of the *YMS-12* was entitled to collect from petitioner one half the damage to the vessel (R. 113). On this view, it was, of course, unnecessary to consider the question of whether the war risk insurance provided by the United States covered liability-over on the part of petitioner as the result of the accident, as well as any physical damage which might have occurred to the *Worthington*, and the court below did not pass upon that question (R. 113).

SUMMARY OF ARGUMENT

The problem raised by this controversy is one of allocation of risk as between two insurers. The ultimate issue to be decided by this Court is whether the United States, as war risk insurer of the *Worthington*, assumed the *Worthington's* liability-over to the United States, as owner of the *YMS-12*, *i.e.*, the collision liability of the owner of the *Worthington* springing from the accident, which was due to the negligence of both vessels. In arriving at the answer, two inquiries, one contingent, however, on the result reached in the first, must be made. The first question to be answered is whether the negligent collision between the *Worthington* and the *YMS-12* was converted from a ma-

rine risk to a war risk, a "consequence of hostilities or warlike operations," solely by virtue of the fact that the *YMS-12* was engaged in a warlike operation at the time of the accident. If not, the collision cannot be classified as a war risk, and the obligation of the United States as war risk insurer of the *Worthington* cannot be invoked. If, however, the collision be deemed a war risk assumed by the United States, then a further inquiry is necessary, whether the war risk insurance issued by the United States covered the liability-over of the *Worthington*, as well as any physical damage which the tanker might have sustained.

I

Although the precise issue involved here has not been before this Court, the problem of establishing a proper line of demarcation between marine risks and war risks is not novel to the courts of this country. In the consideration of these cases, our courts have consistently denied that a collision between a merchant ship and a warship is converted *ipso facto* into a war risk simply because one of the vessels was engaged in a warlike operation at the time of the accident. Rather, the question of whether or not wartime loss or damage is to be covered by marine or war risk insurance has been resolved by an inquiry into the predominant, the proximate, cause of the accident. Thus, the loss is held to be a war risk only when the domi-

nant and effective cause of the loss was an act of war or a warlike operation.

Application of these principles of legal causation to the present situation compels the conclusion that the loss was a marine risk. The cause of the collision between the *Worthington* and the *YMS-12* was the negligence in ordinary navigation on the part of both vessels. The accident was in no way the proximate consequence of the fact that the *YMS-12* was engaged in towing mine sweeps. The result, then, is that the collision was not a "consequence of hostilities or warlike operations," and thus was not a risk assumed by the United States as war risk insurer.

Petitioner's essential contention is that the issue presented here is a novel one, and that in the absence of precise precedent this Court should follow the alleged "conformity rule" laid down by Mr. Justice Holmes in *Queen Ins. Co.* v. *Globe Ins. Co.* (*The Napoli*), 263 U. S. 487, 493, a rule said to command strict adherence to the English decisions. It is then asserted that under English law a collision between a merchant ship and a warship is automatically a war risk, regardless of the cause of the collision or the circumstances. This formalistic approach is not justified. It is doubtful that Mr. Justice Holmes' observation in *The Napoli* is even applicable in the circumstances presented here, since war risk insurance is no longer mercantile but governmental and since the particular English

war risk rules for which petitioner contends have been repudiated by the marine insurance industry. Certainly, his remark established no true "conformity rule," nor can we conceive that the Court intended to establish such a mechanical rule requiring adherence to the English cases where they run counter to the principles of the American cases or reach erroneous results.

II

In the event that the collision is deemed a peril insured against, then the United States, since it is responsible for the proximate results of a risk insured against, must indemnify petitioner for any physical damage suffered by the *Worthington*. However, petitioner's liability-over to the owner of the *YMS-12*, a liability imposed by operation of law, was caused solely by the negligent navigation of the *Worthington's* mariner. Thus petitioner's liability-over is not the proximate consequence of the risk of the collision. Nor can such liability be considered a "consequence of hostilities or warlike operations." The only circumstance of war surrounding the accident was the fact that the *YMS-12* was engaged in the operation of towing minesweeps. It can scarcely be contended that the negligent navigation of the *Worthington's* pilot was in any way consequent upon that operation. We think it clear, therefore, that the war risk insurance issued by the United States did not cover petitioner's

liability-over. This result accords with the pertinent English war risk decision (*Adelaide Steamship Co., Ltd* v. *Attorney General (The Second Warilda)*, [1926] A.C. 172), and applies the principles of liability-over laid down by this Court in the marine insurance case of *General Mutual Ins. Co.* v. *Sherwood*, 14 How. 351.

ARGUMENT

Introductory Statement

This controversy grew out of a collision between the tanker *John Worthington* and a mine sweeper, the *YMS-12*, wherein the warship was damaged and the tanker was not. Both vessels were at fault. The United States, as owner of the *YMS-12*, sought to recover from petitioner, owner of the *Worthington*, one half the collision damages suffered by the *YMS-12*. Petitioner, a self insurer as to marine risks, sought to offset the recovery of such damages by contending that its liability to the United States was covered by war risk insurance issued by the United States to it. The problem thus raised is one of allocation of risk as between two insurers. The ultimate issue to be decided by this Court is whether the United States, as war risk insurer of the *Worthington*, assumed the *Worthington's* collision liability, springing from the accident, to the United States as owner of the *YMS-12*. This raises a two-fold inquiry. The first question to be answered is whether the collision between the *Worth-*

ington and the *YMS-12* can be classified as a war risk. If not, the obligation of the United States as war risk insurer of the *Worthington* cannot be invoked. If the collision be deemed a war risk assumed by the United States, then a further inquiry is necessary; whether the war risk insurance issued by the United States covered collision liability running from the *Worthington* to the *YMS-12;* as well as any physical damage which the tanker might itself have sustained.

The first inquiry, the question of whether the collision was a risk assumed by the United States as war risk insurer, involves the broad problem of distinguishing between marine and war perils. In past consideration of this problem, this Court has established certain principles to be employed in differentiating between marine and war risk coverage. The question of whether this collision was a war risk assumed by the Government is to be determined by the application of these principles, as well as the language affording the present war risk coverage, to the particular facts of the case. By the terms of the war risk binder (*infra*, p. 51) issued by the United States to petitioner pursuant to Clause 20 of their charter party (*infra*, p. 50), the United States agreed to insure petitioner's vessel against "war risks only." The binder and insurance were made subject, however, to the rules, regulations, and policy forms prescribed by the War Shipping Administration. Thus, the extent

of war risk coverage was to be determined by reference to the standard marine and war risk policy of WSA. The war risk endorsement of such policy (*supra*, pp. 2-3) bound the Government to assume the risks excluded from the policy by the F. C. & S. Clause of the policy (*supra*, p. 3). The United States therefore agreed to assume, *inter alia*, "any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *," the coverage provision relied upon by petitioner.

By the stipulated facts (R. 80), the collision "was contributed to both by fault in the navigation of *S.S. John Worthington* and fault in the navigation of the United States Ship *YMS-12*, consisting of failures on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances." The precise question to be resolved, therefore, as found by the court below (R. 112-113), is whether the negligent collision of the *Worthington* and the *YMS-12* was a "consequence of hostilities or warlike operations" solely because one of the vessels was engaged in a warlike operation, sweeping mines, at the time of the accident.[1] We think it clear that the answer is

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[1] Petitioner, however, would twist the stipulation's simple and clear statement of the cause of the collision. Petitioner seizes upon the phrase "under the circumstances," states that one of the circumstances was the fact that the *YMS-12* was towing mine sweeps, and thereby attempts to create the infer-

in the negative. Under settled American law, a negligent collision, a marine peril, is not converted from a marine risk to a war risk simply by virtue of the fact that one of the vessels involved in the collision is a war vessel. The dominant and effective cause of the loss must be the warlike character of the operation, and in negligent collision cases that is plainly not true. The collision, therefore, between the *Worthington* and the *YMS-12* was not a risk assumed by the United States. The result, then, is that the United States is not liable as insurer for any of the losses resulting from the collision, including the collision liability of petitioner, the owner of the *Worthington*.

Petitioner, however, seeks to have this Court reexamine and change the established principles which classify this collision as a marine risk.

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ence that the collision was caused by the fact that the *YMS-12* was engaged in a mine sweeping operation at the time of the accident (Pet. 14-15; Br. 5, 13, 28). On its face, the fifth paragraph of the agreed stipulation of facts refutes this argument (R. 80). It states only the ultimate fact that the parties are agreed that the accident was a result of negligent navigation on the part of both ships under the circumstances. Nowhere does the stipulation contain a reference to any causal connection between the *YMS-12's* mine sweeping operation and the collision. Nor is there any proof in the record that the fact that the *YMS-12* was mine sweeping, rather than engaged upon some other mission, in any way caused or contributed to the collision. Thus, there is no room for speculation as to whether the fact that the *YMS-12* was towing mine sweeps caused the collision or that it was a factor in rendering the conduct of those in charge of the *YMS-12* negligent. In connection with this contention, see the remarks of Judge Clark in the opinion below (R. 113).

Substantially its entire argument is that the precise factual situation involved here has not been passed on by this Court; and that, in accordance with Mr. Justice Holmes' remark in *Queen Insurance Co.* v. *Globe Ins. Co.*, (*The Napoli*), 263 U. S. 487, 493, that there are "special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business * * *," this Court must adhere to English decisional law. Petitioner then asserts that, under English law, a collision between a merchant ship and a warship during time of war is automatically a war risk, a "consequence of hostilities or warlike operations."

Admittedly, the precise factual situation involved herein has not been before this Court. However, the Court has often dealt with the problem of differentiating between marine insurance and war risk insurance and has emphasized that, in order for a war risk insurer to be liable, it is not enough that a vessel merely be engaged in a warlike operation, but that the dominant and effective cause of the loss must be the warlike character of the operation. And the abandonment of this well-settled principle is neither required nor justified by petitioner's reference to the observation of Mr. Justice Holmes in *The Napoli*. The English view on problems in this field is, of course, to be considered along with other materials. There is, however, no binding rule of automatic adherence to English judgments, and Mr. Justice Holmes did

not suggest such a principle. We submit that there is no need to change the established principles and no merit to petitioner's request that it be done.

Only in the event that the collision is adjudged a risk assumed by the United States does the second inquiry arise, the question of whether the war risk insurance issued by the United States covers the collision liability of the owner of the *Worthington*, as well as any physical damage which the tanker might have sustained. Here, again, petitioner's claim must fail. Under the terms of the war risk policy, the *Worthington's* liability-over arose, by operation of law, from the fact that the mariner of the *Worthington* was negligent, and was in no way consequent upon the warlike operation of the *YMS-12*.

I

The Collision Between the *Worthington* and the *YMS-12* Was Not a Peril Insured Against by the United States

A. *Under American Law, War Risk Insurers are Liable Only for Losses caused Directly and Proximately by Acts of War or Warlike Operations.*

The problem of establishing a proper line of demarcation between the losses consequent upon war as distinguished from marine perils is not new to our courts. During the Civil War, the United States made commercial arrangements with private shipowners to supply its forces in the

field. In charters accompanying such arrangements the Government assumed the "war risks" and the shipowners the marine risks. One of the first cases dealing with the problem is *Morgan* v. *United States*, 14 Wall. 531. There a vessel had been chartered to the United States upon the standard Civil War Quartermaster's charter party which required the owner to bear "the marine risk, the United States the war risk." After receiving on board troops and stores to carry to a theatre of active operations against the enemy forces, the vessel was ordered by a United States Quartermaster, for reasons stemming from "the exigencies of the service," to cross a bar under dangerous circumstances, against the judgment of both the master and the pilot of the vessel. Although the voyage was unquestionably an operation of the war, the consequent stranding was held to be marine rather than a war risk. This Court said (p. 535): "That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience to the rule, *'causa proxima non remota spectatur'* we cannot proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel."

Thus, *Morgan* v. *United States*, adopting the principles of legal causation in order to differentiate between marine and war perils, stands for the

proposition that the proximate cause of a loss must be warlike to make the loss a "war risk" and that it is insufficient merely to prove that a loss occurred during a war mission to bring it within the coverage of a war risk assumption.

Following the decision in the *Morgan* case, this Court and the Court of Claims on several occasions considered the term "war risk" occurring in charters between the Government and private shipowners. In accordance with the rule laid down in that case, the following were held to be marine, rather than war, risks: injury to a troop transport from drifting ice when Army orders compelled the voyage even though ice conditions made navigation unsafe, *Reybold* v. *United States*, 15 Wall. 202; damage from a leak sprung while the vessel was carrying military stores, *Goodwin* v. *United States*, 17 Wall. 515; a collision with a drifting derelict while the vessel was proceeding at full speed through dense fog pursuant to military orders, *Mott* v. *United States*, 9 Ct. Cl. 257; a collision, stranding, and bumping while the vessel was carrying men and horses to a theatre of operations, *New Orleans-Belize Royal Mail and Central American Steamship Co. Ltd.* v. *United States*, 239 U. S. 202; see also *Leary* v. *United States*, 14 Wall. 607.

Particularly in point is the case of *White* v. *United States*, 154 U. S. 661. There a vessel, against the wishes of the master, was ordered to land troops in a theatre of active operations. The

vessel was injured because the master of the vessel refused to obey the orders of the general in charge of the operation to move the ship into the stream after the troops and horses were discharged, orders designed to minimize the danger of stranding in the course of military operations. It is difficult to imagine a shipping operation more intimately connected with the prosecution of hostilities, yet the Court held the damage to be the result of the marine risk of negligent navigation, not a war risk. It said (p. 662):

> * * * If loss happened from a "war risk," that is to say, if the war was the proximate cause of the loss, the damage was to be made good by the government; but if it was caused by the refusal of the master to obey those in command of a military expedition to which the vessel was attached, the neglect of the master and not the war would be the proximate cause. This neglect of the master was a marine risk which the owner assumed. * * *

We think that these cases, with their emphasis on the search for the proximate cause of the loss, have an important bearing on the present inquiry. They stand squarely for the proposition that a negligent collision between a tanker and a mine sweeper is not to be considered a war risk simply because the mine sweeper happened to be engaged in a warlike operation.

Petitioner attempts to dismiss these cases as inapplicable because of the difference in language

between the coverage there and in the present situation. Petitioner argues (Pet. 22-23, Br. 39-40) that the phrase involved here, "consequences of hostilities or warlike operations," provides broader coverage than the term "war risk." No authority is cited for this proposition, nor does any such authority exist. There is certainly no language in *Ionides* v. *The Universal Marine Ins. Co.*, [1863] 14 C. B. (N.S.) 259, or *The Petersham*, [1919] 2 K. B. 692, mentioned at p. 22 of the petition and p. 39 of the brief, to support the argument. If anything, the situation is just the reverse of petitioner's contention, for, as remarked by Judge Clark in the court below (R. 104), the parties here listed some twenty-two risks as war risks, one of which was "consequences of hostilities or warlike operations," and regarded this phrase as only one component, of many, of "war risk."[2]

[2] Petitioner, relying on *Bogert* v. *United States*, 2 Ct. Cl. 159, makes the contention that the term "war risk" construed in the earlier cases is distinguishable from the phrase at issue in that it had the limited meaning of "acts of the public enemy, or the casualties of war" (Pet. 20-22, Br. 35-37). It is difficult to see how this argument furthers petitioner's position; certainly the term "casualties of war" is broad enough in its general meaning to have included any loss or damage occurring in those cases. In any event, the results reached there by this Court were arrived at by an inquiry along the lines of proximate cause, not by an inquiry into whether or not the stranding or collision involved was an act of the public enemy or a casualty of war. In this connection, it should be noted that petitioner cites and quotes from the lower court *Morgan* decision, and other very early Court of Claims decisions, and does not even refer to this Court's later opinions in this line of cases (see Pet. Br. 35-37).

Finally, and very importantly, it should be noted that the phrase "consequences of hostilities or warlike operations" was before this Court in *The Napoli*, 263 U. S. 487. Certainly in that case, the Court found no distinction between the coverage provided by that phrase and the term "war risk" involved in the earlier cases. Indeed, it treated the coverage provided by the two terms as coextensive. Mr. Justice Holmes' opinion for the Court, in holding that a collision between two ships sailing without lights and under convoy was not a war risk, reaffirmed the rule, set forth in *Morgan* v. *United States* and the earlier cases, that war risk insurance assumptions were to be narrowly construed, and that the distinction between marine insurance and war risk coverage was to be resolved by an inquiry into the "nearest cause of loss." 263 U. S. at 492, 493. Thus, the Court applied the principle of proximate causation enunciated in the *Morgan* and other Civil War charter cases to the determination of whether the loss was to be classified a "consequence of hostilities or warlike operations." It is clear that the basic issue has always been the same, the problem of war risk assumption, of apportioning between marine risks and war risks. And the approach consistently employed by this Court, the search for the proximate or dominant cause of the loss in order to determine whether the loss be classified a "war risk", is the key to the present inquiry.

Two recent district court decisions, involving the phrase under inquiry, further illustrate the consistent approach of the American courts to the problem of distinguishing between marine and war risk insurance coverage, and are indicative of the result to be reached here. In *Standard Oil Co. of New Jersey et al. v. St. Paul Fire & Marine Ins. Co.*, 59 F. Supp. 470 (S.D. N.Y.), an oil tanker was prevented from discharging its cargo at Havre, France because of the German invasion. It then proceeded to England and, while off the port of Falmouth, signalled for a pilot. While following through the mined harbor a patrol boat which flew the British naval ensign and which had signalled "follow me," the tanker struck a submerged rock and was severely damaged. In holding that the loss was not a "consequence of hostilities or warlike operations" the court said (p. 474):

> It is well settled that the fact that there is a war in progress, or that there are surrounding circumstances of war, in and of themselves, are not sufficient to exclude coverage under a policy containing a F. C. & S. clause, but it must be shown that a cause of loss contemplated by such a clause was the cause "nearest to the loss". [*The Napoli*], 263 U. S. 487.

The case of *Meseck Towing Lines, etc. v. Excess Ins. Co. Ltd.*, 77 F. Supp. 790 (E.D. N.Y.) again illustrates the use of these principles of causation in allocating risk. The issue there was whether

a collision in New York harbor between a tug and a Navy submarine chaser outbound for patrol duty, due to the joint negligence of the two vessels, was "a consequence of hostilities or warlike operations." In the course of an opinion holding the collision to be a marine risk, the court said (p. 793):

> * * * the inquiry should be whether the collision was in consequence of a warlike operation, not did it happen in the course of a warlike operation.

This survey of the pertinent American cases compels the conclusion that under American law a collision between a merchant ship and a warship is not converted *ipso facto* into a war risk simply because one of the vessels was engaged in a warlike operation at the time of the accident, but that the question of whether or not a collision was a "consequence of hostilities or warlike operations" is to be resolved by an inquiry into the predominant, the proximate, cause of the accident.[3] We submit, therefore, that the American rule was accurately summarized by the court below (R. 105):

> * * * a loss will be held to be a "consequence of hostilities" and to come within the

[3] For further examples of the test of proximate causation as the basis for distinguishment between marine risks and war risks, see the analogous cases of *Standard Oil Co. of New Jersey* v. *United States*, 267 U. S. 76; *Reinold* v. *United States*, 167 F. 2d 556 (C. A. 2), certiorari denied, 335 U. S. 824; *Muller* v. *Globe & Rutgers Fire Ins. Co.*, 246 Fed. 759 (C. A. 2); *Dennehy* v. *United States*, 15 F. 2d 196 (S.D. N.Y.).

limits of war risk insurance where one of the vessels party to the loss is both engaged in a warlike operation and so navigating as a result of the war that it creates a peril. To put it another way, not only must the vessel's mission be one of war, but the warlike character of its operation must be the dominant and effective cause of the resulting catastrophe.

B. *The Collision Between the* Worthington *and the* YMS-12 *Was a Marine Risk Since the Proximate Cause of the Collision Was Ordinary Negligent Navigation on the Part of Both Vessels.*

Application of the foregoing principles of legal causation to the present situation permits but one result. Here, there can be no doubt that the effective and proximate cause of the collision between the *Worthington* and the *YMS-12* was the negligence in ordinary navigation on the part of both vessels. The only circumstance of war surrounding the accident was the fact that at the time the *YMS-12* was engaged in the operation of towing mine sweeps. At most, however, this is a condition, not the dominant cause, of the accident, for, as we have seen previously, *supra*, pp. 14-15, fn. 1, there was no causal connection between the negligence of the mariner in charge of the *YMS-12* and the fact that the vessel was on a warlike operation. The negligence causing the disaster was the failure of the mariner of the war vessel, and of the *Worthington*, to observe the ordinary rules of safe

navigation for the prevention of collisions. It is too well settled to require citation that such a risk is a peril of the sea, a marine risk, customarily and ordinarily assumed by marine underwriters. It is not the sort of hazard of war which it was contemplated that the Government would assume.[4]

We submit, therefore, that the collision was plainly not a "consequence of hostilities or warlike operations", as that term was used in the F. C. & S. clause, and thus was not a risk assumed by the Government pursuant to the war risk binder issued by it to petitioner.[5] It is, of course, axio-

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[4] Petitioner's argument (Pet. 17-18, Br. 32-33) that negligence cannot be an intervening cause which takes a loss out of the war risk category, since insurance against a specified peril is not affected by the cooperation or contribution of another cause or of negligence contributory to the loss, is irrelevant. This argument simply begs the issue, for it assumes, as its major premise, that the collision between the *Worthington* and the *YMS-12* is initially a war risk. Only if it be first granted that the "specified peril" is a war risk does petitioner's contention have any bearing. Here, the peril was a peril of the sea, a marine risk, and neither initially nor ultimately a war risk.

[5] In accord with the Government's position is the case of *Meseck Towing Lines, etc.* v. *Excess Ins. Co., Ltd.*, 77 F. Supp. 790 (E.D. N.Y.), where the court refused to hold a collision between a warship and a tug to be a consequence of hostilities or warlike operations because "the 'cause nearest to the loss' [citing *The Napoli, supra*] i.e. the proximate, not the remote cause, must be held to be negligence in navigation in a peaceful harbor. That the vessel in collision with the civilian ship chanced to be a warship constitutes at most a remote but not a proximate cause." 77 F. Supp. at 793. Similarly consistent is the finding by the district court in *The Napoli* that the collision involved there was a marine risk since "the navigators of both Napoli and Lamington failed in their ship management to exercise the ordinary care and skill of their calling. Therefore such negligence was the proximate cause of the collision, and the loss must fall upon the marine under-

matic that if the Government did not assume the risk of the collision, it did not assume the risk of any of the consequences of the collision. The result, then, is that the United States is not liable as the war risk insurer of the collision liability of petitioner.

We believe this to be the fair and common sense result, for it is reached by the application of the principles of legal causation, the method consistently followed in the insurance field in the determination of the liability of underwriters. It is to be noted, moreover, that this conclusion is further fortified by the fact that a collision is *prima facie* a peril of the sea, and by the consequent rule that the burden of proof in this sort of situation is on one who claims that the loss resulted from a war risk, rather than a marine risk. See *Reybold* v. *United States*, 15 Wall. 202; *United States* v. *Standard Oil Co. of New Jersey*, 291 Fed. 1 (C. A. 3), reversed on other grounds, 267 U. S. 76; *The Napoli*, 282 Fed. 976 (C. A. 2), affirmed, 263 U. S. 487. Cf. *Western Assur. Co. of Toronto* v. *Shaw*,

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writers." 278 Fed. 770, 782 (S. D. N. Y.), affirmed, 282 Fed. 976 (C. A. 2), affirmed on other grounds, 263 U. S. 487. Cf. *White* v. *United States*, 154 U. S. 661.

Petitioner attacks the use by the court below of the *Meseck* case by referring to a conclusion of law included in the A. M. C. report of the case, but not in the Federal Supplement report (Pet. Br. 46). Whatever effect should be given to this finding, it does not convert the case into an authority which supports petitioner's position. The rationale of the decision is directly opposed to petitioner's thesis. Cf. the reading given by the *Meseck* opinion to the English decisions upon which petitioner relies. 77 F. Supp. at 792-793.

11 F. 2d 495 (C. A. 3), certiorari denied, 273 U. S. 698. That petitioner has not met this burden is apparent from the stipulated facts which show agreement that the cause of the collision was "failures on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances." As the lower court pointed out (R. 113), "this finding not only fails to satisfy the burden on [petitioner] to show that the loss was a consequence of hostilities, but rather is a positive indication that the loss was due to the normal marine risk of failure to comply with the applicable rules and the requirements of good seamanships."

C. *House of Lords Decisions Are Not Conclusive of the Issue Here and Should Not Be Accepted.*

To avoid the impact of this Court's prior decisions, and the result reached by the court below, only one argument is advanced seriously by petitioner. As the basis for its request that the collision be held a war risk, petitioner argues (Pet. 16-26, Br. 18-29) that the precise issue presented here has not been passed upon by this Court, and that in the absence of precedent this Court is bound by a rule of law said to be embodied in the observation of Mr. Justice Holmes in *Queen Ins. Co.* v. *Globe Ins. Co.* (*The Napoli*) that there are "special reasons for keeping in harmony with the ma-

rine insurance laws of England, the great field of this business * * *." 263 U. S. 487, 493. This remark of Mr. Justice Holmes is put forward as a "conformity rule," whereby this Court commanded mechanical adherence to English decisional law (Pet. 15, 24, 25; Br. 20). Relying principally on *Attorney General* v. *Adelaide Steamship Company* (*The Warilda*), [1923] A. C. 292; *Board of Trade* v. *Hain Steamship Company* (*The Roanoke—The Trevanion*), [1929] A. C. 534; and *Yorkshire Dale S. S. Co., Ltd.* v. *Minister of War Transport* (*The Coxwold*), [1942] A. C. 691, petitioner then states the English law to be that a collision between a merchant ship and a warship during time of war is automatically a war risk. We think that this argument will not bear scrutiny.

1. It is doubtful that Mr. Justice Holmes' remark in *The Napoli* is even applicable to the situation presented here. Behind his remark was the assumption that he was dealing with a mercantile matter, reflected in English decisional law, whose greatest source of authority consisted of the customs and usages of British underwriters, purveying both war and marine insurance to all nations. Uniformity of decisional law would be a convenience to private underwriters on both sides of the Atlantic. But we are, of course, no longer dealing with a mercantile matter when defining the relationship, under modern conditions, of marine and war risk insurance. On the contrary, it is only

fair to characterize the problem as predominantly governmental. The non-governmental war risk insurer tends to disappear from the scene as soon as modern hostilities begin on any considerable scale. See S. Rep. No. 1942, 76th Cong., 3d sess., pp. 2, 3-4, 5-7; H. Rep. No. 2499, 76th Cong., 3d sess., pp. 2-4. The question presented is no longer one of apportioning risk between two private insurance companies, and there is, accordingly, little need to keep in harmony with the practice in England, "the great field of this business * * *" (263 U. S. at 493).

Moreover, underlying Mr. Justice Holmes' observation was the assumption that English decisional law accurately reflected English insurance usage and understanding as to coverage, and should be followed for that reason. It is probable, however, that the decisions in *The Warilda, supra*, and *The Roanoke—The Trevanion, supra*, the cases relied on principally by petitioner, were not unmotivated by a national policy of shoring up the weakened financial structure of British marine insurance companies in the aftermath of World War I.[6] But whatever the underlying occasion for certain expressions in these opinions, their reiteration by some of the law lords in *Yorkshire Dale S. S. Co., Ltd.* v. *Minister of War Transport* (*The Coxwold*), *supra*, obtained an immediate reaction from the

[6] This observation gives rise to no need for protection of the integrity of the House of Lords. See Pet. Br. 48. It is well understood, we believe, that considerations of national policy and national need frequently and properly motivate judicial decision.

British marine insurance industry which should preclude trans-Atlantic acceptance of those broad statements. In *The Coxwold*, Lord Wright pointed out that if the result of the English decisions was felt to be undesirable, the F. C. & S. Clause could be changed, stating that a "* * * contract can be changed if it does not work satisfactorily." [1942] A. C. 691 at 707. The British underwriters in 1942 promptly changed, without any increase in premiums, the form of the F. C. & S. Clause so as to make it clear that war risk coverage was limited to those occasions when the warlike character of the operation was the direct and effective cause of loss.[7] As pointed out by the editors of *American Maritime Cases*, [1943] A. M. C. 130, 131, this change was adopted "to correct and restore the distribution of marine and war risk" as affected by the *Coxwold* decision; it also "sets aside" (*id.*, at 130) the result of the *Roanoke-Trevanion* and *Warilda* cases.[8] Thus, with this action of the

[7] "* * * but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power." F. C. & S. Clause (1942), [1943] A. M. C. 130, 131.

[8] In so far as marine insurance underwriters were concerned, the favorable aspects of the House of Lords decisions in the 1920's were static, conferring benefits only as to contracts already made and obligations already matured. As to future application, marine underwriters were obviously unwilling to accept the obsolescence which logically fell to their lot if substantially all risks were to be considered war risks. American underwriters displayed the same reaction to the extreme reading of *The Coxwold* and related decisions,

British underwriters, all demand for conformity because of business expediency ceased. See also the remarks of the court below on this matter (R. 111).

2. Even if it be assumed that Mr. Justice Holmes' remark in *The Napoli* established the principle of automatically and uncritically following analogous English decisions in the absence of any direct Supreme Court authority, it should be noted that the English cases relied on by petitioner by no means clearly support an attack on the decision below. The opinion of the Court of Appeals in this case contains an excellent critical analysis of the major English cases. Throughout all of them, verbal adherence, at least, is paid to the use of causation as a means of allocating war and marine coverage. It is true that certain of the English judges have announced a so-called "umbrella" theory which looks beyond the nearest cause and constitutes, in fact, a change from the use of causation to a search for status, an attempt to outline mechanically the consequences of various physical

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here advocated by petitioners. At their annual meeting on October 8, 1942, the Association of Average Adjustors expressed a view that the "marine insurance world does not have to acquiesce in the views of the judges expressed in the *Coxwold* opinions * * *." The Chairman, Mr. F. Porter Gore, suggested that the "* * * F. C. & S. Clause may be redrafted so as to diminish the extent of the war risk element and build up the marine risk aspect sufficiently to justify continuance of the marine risk coverage at the prevailing high rates of premium. * * *". *Minutes of the Annual Meeting of the Association of Average Adjustors of the United States*, October 8, 1942, p. 2612. Mercantile considerations of this character are obviously of no interest to petitioner, a self insurer.

situations class by class. Thus, it is said that any collision with a war ship is a war loss and that any merchant ship carrying war cargo to a forward base is a "quasi-warship," with the result that any eventuality which befalls her on her voyage is a "consequence of hostilities or warlike operations." Such theories are summarized in the speech of Lord Porter in *The Coxwold*, [1942] A. C. 691, 715-716. Throughout these cases, however, there is no clear abandonment of the rule of causation adhered to by this Court in *The Napoli*, and the actual holdings can all be explained on that basis. See analysis of these cases, and materials cited, by Judge Clark in his opinion in the court below (R. 105-108). For example, two of the five law lords speaking in *The Coxwold*, the Lord Chancellor (Viscount Simon) and Lord MacMillan, rested their decision on the usual proximate cause inquiry. And the most recent decision by the House of Lords, *Liverpool and London War Risks Association, Limited* v. *Ocean S. S. Co., Limited* (*The Priam*), [1948] A. C. 243, indicates plainly that primary importance again attaches to proximate causation, as used in *The Napoli*, in apportioning risk as between war and marine insurance, and that status (*i.e.*, being engaged in a warlike operation) does not in and of itself automatically allocate the risk to the war insurer.

3. In any event, petitioner's argument that these English cases must be followed fails, for it is based

on the fallacious premise that Mr. Justice Holmes intended to require the acceptance of a special "conformity rule." On the contrary, his language was a passing acknowledgment of the practical mercantile considerations involved in the shipping business, a particular expression of the general observation, frequently made by this Court and other federal courts, that "it is desirable, if there is no injustice, that the maritime law of this country and of England should agree." *The Eliza Lines*, 199 U. S. 119, 128.[9] This Court has, however, never felt itself bound by these mercantile considerations urging uniformity. Whenever it felt that justice, or the reason of the matter, or the American law so required, the Court has not hesitated to depart from British maritime law. See, *e.g.*, *Peters* v. *Warren Ins. Co.*, 14 Pet. 99; *Lanasa Fruit Steamship and Importing Co.* v. *Universal Ins. Co.* (*The Smaragd*), 302 U. S. 556; *Aetna Ins. Co.* v. *United Fruit Co.*, 304 U. S. 430. Clearly, then, Mr. Justice Holmes' remark cannot be treated as stating a special rule of law which commands automatic adherence to the English decisions in the marine insurance field. Certainly this Court does not so construe it. *E. g.*, *The Smaragd*, *supra*;

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[9] Consideration of English law in insurance matters is but one aspect of respect for English views in the maritime field generally. That recognized and long continued cleavages between English and American rules can exist in important admiralty fields is familiar. See Brief for the United States, p. 22, *Alcoa Steamship Co.* v. *United States*, No. 271, October Term, 1949.

Aetna Ins. Co. v. *United Fruit Co., supra.*[10] Accordingly, as in other maritime cases, it is always open to a party to show that the English decisions reach erroneous results or run counter to the American cases. There can be no such formalistic approach as that adopted by petitioner—mechanical reliance on English law.[11]

We have pointed out above that the decision below was reached by the application of certain principles of legal causation laid down by this Court in prior decisions dealing with marine and war risk insurance coverage. *Supra,* pp. 17-28. Moreover, the result below, denying liability on the part of the United States as war risk insurer except for losses directly and proximately caused by acts of war, involves no radical departure from the general principles governing insurance law, and is entirely in accord with the well-settled rule that insurers are liable only for the proximate, not the remote, cause of the loss. See *e.g., Peters* v. *War-*

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[10] For this reason, the authority of the case of *General Ins. Co. of America* v. *Link*, 173 F. 2d 955 (C.A. 9), the decision relied on by petitioner as stating the American view, is seriously weakened. By the court's own statement (p. 956), and by petitioner's admission (Pet. 14, 24; Br. 20, 21-22), the result there was reached, not by application of the principles of proximate causation or by a fresh consideration of the issue, but by treating the English cases as controlling, even though the court recognized that those opinions are in conflict with the applicable American cases.

[11] That petitioner's position is purely formalistic is revealed by its contention that mercantile considerations are not the basis of the suggestion typified by Mr. Justice Holmes' remark in *The Napoli.* Pet. Br. 20. It is difficult to think of any other reason why there should be agreement between the English and the American law in the admiralty field.

ren Ins. Co., 14 Pet. 99; *General Mutual Ins. Co.* v. *Sherwood*, 14 How. 351. On the other hand, the English opinions to which petitioner refers sharply depart from the established American principles of war risk insurance.[12] They are dubious precedents, often reaching their results on unrealistic or arbitrary grounds.[13] The rule which petitioner draws from them, and which is here urged upon the Court, amounts to no less than saying, as noted by the court below (R. 110), that the Government, as war risk insurer, becomes liable for all marine risks and perils, with minor excep-

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[12] In this connection, reference might be made to petitioner's professed acceptance of the application of the doctrine of causation in determining coverage. Pet. Br. 29-32, 33. Petitioner's true position, and that which necessarily flows from the statements in the English decisions upon which petitioner relies, is completely different. The language of causation is not abandoned. See, *e.g.*, excerpts quoted at pp. 23-24 of petitioner's brief. Actually, the principal English opinions cited by petitioner assume that the category of war risk attaches to a vessel's operation by virtue of character of voyage or cargo; and that everything thereafter befalling is a consequence of the status thus given, without reference to causal connection. See, *e.g.*, *The Coxwold*, [1942] A. C. 691, 711. The result of this abandonment of causation, developed in collision and stranding cases, is so inflexible that even English courts must take refuge in somewhat illogical physical distinctions to avoid application of the status theory. Cf. *The Clan Matheson*, [1929] A. C. 514. Thus, in *The Priam*, marine insurance coverage was found to apply in the case of heavy weather damage to commercial cargo on a ship concededly on a warlike operation under the English rule, on the ground that, being struck by a sea, the ship was passive rather than active [1948] A. C. 243, 257. This would seem to resurrect the archaic aspects of the use of *deodands* to solve modern insurance coverage problems. Cf. Holmes, *The Common Law*, pp. 24 ff. (1938 ed.).

[13] For a criticism and description of the English cases, see Note (1941) 51 Yale L. J. 674.

tions, whenever hostilities begin—at least where warships or war activities are involved.[14] Again, as noted by the court below, there would be little point in the continued existence in wartime of the marine insurance industry. There would be no justification for the payment of marine insurance premiums if substantially all risks during hostilities were to be classified as war risks, the logical result of petitioner's contention (R. 110). The insurance industry, both here and in England, has rejected the principles which petitioner desires to substitute for the war risk insurance rules previously accepted in this country. *Supra*, pp. 31-32. We cannot but feel that the insurance world is well rid of these novel and expansive principles. It would be a mistake, we submit, to accept them here in the place of the established rules properly applied by the court below.

II

Even If the Collision Were a Risk Assumed by the Government and It Were Liable for Any Physical Damage Which the *Worthington* Might Have Suffered, the Policy in Suit Does Not Insure Against the Liability of the *Worthington* or Its Owner to the United States Consequent Upon the Collision

In the event that the collision is deemed a "consequence of hostilities or warlike operations," and

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[14] This, of course, is directly contrary to the intention of the parties as expressed in Clause 20 of the charter party. By that clause (*infra*, p. 50), the Government assumed the war risks and petitioner agreed to insure or assume the marine risks.

thus a peril insured against, then admittedly any physical damage suffered by the *Worthington* would be the direct result of the warlike operation and the United States would be liable as insurer for the hull damage of the *Worthington*. But the *Worthington* suffered no damage, and this suit involves only petitioner's liability to the United States as owner of the *YMS-12*. There is, therefore, still a further question to be answered: whether the war risk insurance issued by the United States also covers the liability-over of the owner of the *Worthington*, *i.e.*, whether such collision liability can likewise be considered the direct result of the warlike operation of the *YMS-12*.

By the war risk endorsement to the policy in question (*supra*, pp. 2-3) the United States limited its liability to "* * * only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by the warranty." Thus, the United States agreed to assume the risks excluded by the F. C. & S. warranty. The F. C. & S. clause (*supra*, p. 3) provides in pertinent part:

> * * * this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *.
>
> If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the

extent that their terms are inconsistent and only while such war risk endorsement remains in force.

The policy's collision or running-down clause is set out in Appendix C, *infra*, pp. 52-53. By its terms, the insurer agrees to indemnify the insured vessel's owner in the event the vessel comes into collision with another ship and becomes liable to pay and pays damages in respect of such collision. The issue presented in this inquiry, therefore, is whether the liability undertaken by an insurer in the collision clause is or is not a risk which would be excluded by the F. C. & S. clause as being a "consequence of hostilities or warlike operations." If this liability is such a risk as is excluded by the F. C. & S. clause, then, in accordance with the provisions of the war risk endorsement, it is assumed by the Government and the Government must indemnify petitioner. If not, the United States is not liable as war risk insurer.

1. We think the answer to this issue to be plain. If the collision be deemed a peril insured against, a "consequence of hostilities or warlike operations," then clearly any physical damage suffered by the *Worthington* would be the result of such risk and the Government would be bound to make such loss good since it is responsible for the proximate results of a peril insured against. It by no means follows, however, that petitioner's liability-over is the result of such risk. Petitioner's liabil-

ity to the United States as owner of the *YMS-12* did not proximately arise from the collision. Instead, petitioner's liability arose by operation of law—the duty, imposed by law, of the master to make amends for the negligence of his servants. Without the negligence of the *Worthington's* mariner, no loss would have been suffered by petitioner, no collision liability would have arisen. Clearly, then, the negligent navigation of the pilot of the tanker was the proximate cause of petitioner's liability.

We think this is settled by the decision in *General Mutual Ins. Co.* v. *Sherwood*, 14 How. 351. There, this Court held that a vessel's liability-over did not arise from the collision but from the negligence of the vessel's navigator. See also *The Barnstable*, 181 U. S. 464, 469. The Court, of course, was not concerned with the perils embraced in the F. C. & S. clause ("consequences of hostilities or warlike operations") but with the perils in the perils clause proper ("perils of the sea"). Surely, the same reasoning applies, however. If a liability-over was too remote and was not proximately caused by a "peril of the sea" (collision) because the proximate cause was negligence,[15] it is difficult to see how liability-over could

[15] "* * * In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion, and did not in and by itself occasion the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and there-

be said to be proximately caused by a "warlike operation" (leading to a collision) since the liability-over here as well springs from the negligence of the vessel, and it can scarcely be contended that the negligent navigation of the *Worthington's* pilot was in any way consequent upon the fact that the *YMS-12* was engaged in the warlike operation of towing mine sweeps. Accordingly, we submit that petitioner's collision liability was not a risk excluded by the F. C. & S. clause, and that the United

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fore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss.

"The case at bar presents an illustration of both rules. So far as the brig Emily was herself injured by the collision, the cause of the loss was the collision, which was a peril insured against; and the assured, showing that his vessel suffered damage from that cause, makes a case, and is entitled to recover. But he claims to recover not only for the damages done to his vessel, which was insured, but for damages done to the other vessel, not insured. To entitle himself to recover these, he must show not only that they were suffered by a peril of the sea, but that the underwriter is responsible for the consequences of that peril falling on a vessel not insured. It is this responsibility which is the sole basis of his claim, and to make out this responsibility he does not and cannot rest upon the occurrence of a collision; this affords no ground for this claim; he must show a particular cause for that collision; and aver that by reason of the existence of that cause, the loss was suffered by him, and so the underwriter became responsible for it.

"This negligence is therefore the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In the strictest sense, it causes the loss to the plaintiff. The loss of the owners of the Virginian was occasioned by a peril of the sea, by which their vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servants. Of his loss this negligence is the only efficient cause, and in the sense of the law it is the proximate cause." 14 How. at 6-367.

States therefore cannot be held as the insurer of such liability.

This result is in accord with the English view, expressed in the leading case of *Adelaide Steamship Co., Ltd.* v. *Attorney General* (*The Second Warilda*), [1926] A. C. 172. By the terms of the charter party between it and the vessel's owner, the Admiralty agreed to assume "those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause; 'Warranted free * * * from all consequences of hostilities or warlike operations * * *:' " Thus the form of words whereby the Crown assumed war risks was somewhat different from the situation at bar, but the risks assumed by the Crown were the same as those assumed by the United States, *i.e.*, "consequences of hostilities or warlike operations." There it was assumed ([1926] A. C. at 178, 181) that the hypothesized policy, from which the risks to be borne by the Admiralty were excluded, included a collision clause, similar to the one here. The issue was therefore the same as here, whether the liability undertaken by the collision clause was a risk excluded by the F. C. & S. clause as being a "consequence of hostilities or warlike operations." The House of Lords held that it was not, since such liability was not the proximate consequence of any warlike operation, but of the negligence of the master of the vessel.

There was also a second ground for the decision, based somewhat on the historical background of the collision clause. As a matter of insurance law, the collision clause was not strictly a part of the marine policy but an additional and independent contract superimposed upon the policy. The collision clause, therefore, could not have been excluded from the policy by the F. C. & S. warranty for it was never a part of the policy; "the subject matter on which this exclusion operates never included it." [1926] A. C. at 182. Thus, as the second ground of the decision, the House of Lords held that the F. C. & S. clause was not operative at all with respect to the collision clause.

It appears that our courts also consider a collision clause to be a separate and distinct covenant, super-imposed on the marine policy. In *Fireman's Fund Ins. Co.* v. *Globe Navigation Co.*, 236 Fed. 618 (C. A. 9), the court, in referring to a printed clause on the margin of the policy assuming collision liability, said (p. 631): "This *special contract* is known as the 'collision' clause, or, as it is better named, the 'running-down' clause." (Emphasis supplied.) And in *Western Transit Co.* v. *Brown*, 161 Fed. 869 (C. A. 2), the court remarked: "When it was desired to protect the owner against loss because of his liability for damage caused by his own ship to another ship, the running-down clause was inserted in *the ordinary policy*." (Emphasis again supplied.) It follows that a second argument can

be advanced to support the Government's position—the argument that the collision clause is not an integral part of the policy and thus cannot be excluded by the F. C. & S. clause since the latter does not operate at all with respect to it. The result, then, is that the United States did not assume petitioner's collision liability. Nor is the result affected by the existence in the war risk endorsement (*supra*, pp. 2-3) of the parenthetical phrase "including the Collision Clause" since the liability covered by that clause would not be excluded by the F. C. & S. warranty, and the war risk insurance covers only those risks excluded by that warranty. We believe, however, that the problem is best approached through an inquiry into the proximate cause of petitioner's liability-over. This is the method adopted by this Court in the *Sherwood* case and is the basic ground of the decision in *The Second Warilda*.[16] Thus, we prefer to rest our case on the former argument.

2. Petitioner's argument that the Government's war risk policy covers liability incurred as a result of negligent navigation by the mariners of the *Worthington* in the course of a commercial voyage is predicated almost entirely upon the proposition that the Government assumed such liability by the use of the parenthetical phrase "including the col-

[16] We, of course, do not contend that the result reached by the House of Lords is conclusive of the issue here. We do think, however, that the decision merits strong consideration by this Court since the rule there announced is not contrary to the American rule, but is entirely in accord with the principles laid down by this Court.

lision clause" in the war risk endorsement, in conjunction with a so-called "subordination clause" appended to the F. C. & S. Clause (Pet. 27-28, Br. 50-55).[17] Petitioner contends that the last sentence of the F. C. & S. clause (*supra*, p. 3)[18] is a "subordination clause which subjects the exclusions of the F. C. & S. Clause to the control of the war risk endorsement" (Pet. 27). Thus, it is said, the situation presented here is different from that in *The Second Warilda*, for the F. C. & S. clause is to be considered as containing the phrase "including the collision clause." As a result, petitioner argues that the liability undertaken in the collision clause is assumed by the United States since the collision clause is excluded from the policy by the F. C. & S. clause.

We find this line of reasoning rather strained and circuitous. It imports into the F. C. & S. clause an additional term, solely by way of the war risk endorsement which, by its terms, covers only those risks already excluded by the F. C. & S. warranty. Moreover, the argument overlooks a significant

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[17] This was the approach adopted by the district court (R. 93-94) in finding that the United States was the insurer of the collision liability of petitioner. As already remarked, this question was not reached by the court below since it found that the collision was not a risk assumed by the Government.

[18] The last sentence of the F. C. & S. clause provides:

> If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

word in the last sentence to the F. C. & S. clause, the so-called "subordination clause." That word is "only." The sentence states that any war risk endorsement "shall supersede the above warranty *only* to the extent that their terms are inconsistent and *only* while such war risk endorsement remains in force." (Emphasis supplied). This sentence, far from being a "subordination clause," would seem to be an "anti-subordination clause," designed to limit the extent to which the F. C. & S. warranty can be subordinated or affected by any subsequent endorsement; its apparent purpose was to make the F. C. & S. clause stand independently of later policy provisions. It seems probable that this sentence was inserted in view of certain canons of construction, which require that a policy be construed against the insurer and which give wider effect to words whereby the underwriter assumes risk than to words excluding risks from coverage. Thus, we think that there is no foundation for the argument that anything in the last sentence of the F. C. & S. clause is intended to import any part of a subsequent war risk endorsement into the F. C. & S. clause.

Nor does that endorsement purport to supersede or alter the language of the F. C. & S. clause in any respect. To the contrary, it expressly adopts *in toto* the language of the clause as it stands and constitutes an agreement that the Government as underwriter shall be liable only for those risks ex-

cluded by the precise unaltered language of the F. C. & S. clause. Moreover, the parenthetical phrase "including the collision clause" appearing in the war risk endorsement merely serves to identify the policy from which the risks to be borne by the Government were to be excluded. In *The Second Warilda* there was a theory that certain language in the charter party contemplated a policy not containing a collision clause at all. [1926] A. C. at 175, 180, 185. As we have seen, this theory was rejected and it was assumed by the House of Lords that the hypothesized policy contained a collision clause but that, despite this fact, the Crown had not assumed collision liability. It seems probable, therefore, that the phrase under discussion was inserted to avoid the possibility of any such theory being raised here. The parenthetical phrase seeks to avoid confusion by expressly *stating* what was *assumed* to be the fact in *The Second Warilda*.[19]

We submit, therefore, that there are no language

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[19] Thus, it is not necessary, as argued by petitioner (Br. 55), to reach the result for which it contends in order to give the parenthetical phrase any effect. Furthermore, there might possibly be collision liabilities which are consequences of hostilities. If, for example, a collision resulted from a decision to display misleading lights to an approaching vessel thought to be an enemy, a very close question would be presented. Such a willful act might well be tortious even though unquestionably a war operation and the resultant liability a consequence of that hostile act. In such a case, it would be open to the vessel's owner to argue that the war risk assumption, including the parenthetical phrase, evidenced an intention to afford coverage against such a liability, despite the fact that the running-down clause is not an integral part of a marine insurance policy.

differences in the contracts involved here and in *The Second Warilda* which would justify any difference in result. Nor do we think a different result was intended. We find it difficult to believe that it was intended to avoid the result of the *Second Warilda* by placing an innocuous parenthetical phrase in the clause describing the policy defining the total risk to be divided between war and marine underwriters, and yet omitting all reference to the running-down clause in the vital exclusory language of the F. C. & S. warranty which defined the risks to be assumed.

Even if petitioner's argument be accepted, that argument merely avoids the impact of the second ground of the decision in *The Second Warilda*, not the basic ground of the decision. As we have seen, the primary basis of the decision was an inquiry along the lines of legal causation. The Crown was held not to have assumed, as war risk insurer, the collision liability since such liability was the proximate consequence of negligence. Petitioner's argument does not meet this holding, a holding which is entirely consistent with the principles laid down by this Court in *General Mutual Ins. Co.* v. *Sherwood, supra*, and which in reality is but a reaffirmation of the American rule as stated in the cases cited in Point I of this brief, the rule that surrounding circumstances of war are not enough to establish loss through a war risk.

It should finally be noted that the Government

can, in no event, be held liable for petitioner's expense in prosecuting this claim. By the express words of the collision clause, *infra*, pp. 52-53, the Government is to assume only the costs of those proceedings which resist the imposition of collision liability or which endeavor to limit such liability. Here the collision liabilities were disposed of by settlement and agreement of the parties (R. 68-70), and petitioner did not resist the imposition of collision liability. This litigation has been almost solely concerned with the enforcement of certain asserted claims upon the policy in suit, arising from the agreed imposition of collision liability.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the district court should be reversed, and that the judgment below should be affirmed.

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OCTOBER 1950.

APPENDIX A

Clause 20 of the time charter entered into between petitioner and the United States provides in pertinent part (R. 80-81):

> Clause 20. Unless otherwise mutually arranged, at all times during the currency of this Charter the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, which shall include malicious damage, sabotage, strikes, riots and civil commotion, insured for and valued at the amount set forth in Part I which insurance shall be made payable to the persons entitled thereto;
>
> * * * * *
>
> Except as to risks or liabilities assumed, insured or indemnified against by the Charterer pursuant to this Charter, unless otherwise agreed, the Owner shall assume or insure against all other risks or liabilities of whatever nature including without limitation those of a Marine Hull and P. and I. nature and such Hull and P. and I. coverage shall also protect the interests of the Charterer to the extent of the liability it would have if it were the owner of the Vessel.

APPENDIX B

The war risk binder of insurance issued by the United States to petitioner contains, among others, the following provisions (R. 81-82):

> War Risks Binder—R. C. No. 401—Covering Vessels Requisitioned by the War Shipping Administration Division of Wartime Insurance, Washington, D. C.
>
> The War Shipping Administration hereby insures against War Risks Only the risks as listed in schedule below:
>
> Assured: Standard Oil Company of New Jersey.
>
> Address: 30 Rockefeller Plaza, New York, New York.
>
> Vessel: John Worthington. Flag: U. S.
>
> From: Time of delivery to War Shipping Administration about April 22, 1942.
>
> To: Termination of charter.
>
> 1. Hull.,
>
> DWT 12475 Speed 10.8 Knots Date Built 1920 Value $935,625.
>
> Amount $935,625.
>
> * * * * *
>
> SCHEDULE A
>
> * * * * *
>
> 3. This binder shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration. * * *
>
> * * * * *

Endorsement No. 1 to be attached to Binder No. R. C. 401 Issued Standard Oil Company of New Jersey by the War Shipping Administration.

It is warranted that

* * * * *

2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to this vessel accepted by the assured and any modifications or amendments thereto.

APPENDIX C

The collision clause of the standard marine and war risk policy of War Shipping Administration provides (R. 71-72):

Full collision—Sister-ship collision. And it is further agreed that if the Vessel hereby insured shall come into collision with any other ship or vessel and the Owners or Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Assurers will pay the Owners or Charterers such proportion of such sum or sums so paid as the Assurers' subscription hereto bears to the value of the Vessel hereby insured, provided always that their liability

in respect of any one such collision shall not exceed their proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, the Assurers will also pay a like proportion of the costs which the Owners or Charterers shall thereby incur, or be compelled to pay; * * *

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